

DATE: July 16, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-14139

## **DECISION OF ADMINISTRATIVE JUDGE**

**BURT SMITH**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's 1989 felony conviction for grand larceny resulted in a sentence of two years imprisonment, thereby requiring application of 10 U.S.C. 986 which precludes grant of a security clearance except where the Secretary authorizes a waiver. No waiver is recommended. Clearance is denied.

### **STATEMENT OF THE CASE**

On December 17, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In an answer notarized on January 11, 2002, Applicant responded to the allegations set forth in the SOR with five supporting documents, and she elected to have her case decided on the written record, in lieu of a hearing.

A complete copy of the Government's File of Relevant Material (FORM) was sent to the Applicant on March 6, 2002, and she received it on March 12, 2002. She was afforded thirty days to file objections and submit further material in refutation, extenuation, or mitigation. Applicant submitted additional information attached to a transmittal letter dated March 28, 2002. The case was assigned to another Administrative Judge on April 9, 2002, and it was transferred to me on ay 31, 2002.

### **FINDINGS OF FACT**

The Applicant is thirty-nine years old, and she is employed by a defense contractor as documentation specialist. She requests a DoD security clearance in connection with her employment in the civilian defense industry. The Government opposes the request because of Applicant's alleged criminal activities, personal misconduct and excessive debts, all

leading to concerns about her trustworthiness. The following findings of fact are entered as to the allegations in Paragraphs 1, 2 and 3 of the SOR.

**Paragraph 1 (Guideline J - Criminal Conduct).** The Government alleges Applicant is ineligible for clearance because she engaged in felony and misdemeanor criminal conduct as set forth in twenty-seven subparagraphs of the SOR, 1.a. through 1.aa. In general Applicant admits to one felony conviction and numerous misdemeanor violations (mostly for failure to file income tax returns) during the years 1989 through 1998. Concerning those allegations admitted by the Applicant, the Government has met its burden of proving their factual accuracy.

*Subparas. 1.a - 1.c.* In her response and in her earlier sworn statements, Applicant admits that during the period September 1988 to March 1989 she engaged in felony theft while employed as a cashier at a major department store. (SOR, subpara. 1.a.) Specifically, she permitted her relatives to leave the store with about \$12,000 worth of unpaid merchandise. Through her position as a cashier, Applicant provided her relatives with receipts that allowed them to take merchandise without payment.

Security personnel discovered Applicant's role in the thefts and she was arrested and convicted of grand larceny. Applicant was sentenced to two years in prison (suspended), two years probation, and restitution. Applicant further admits that in 1996 and 1998 she was charged with two more criminal offenses related to unlawful evasions of financial responsibility. (SOR, subparas. 1.b. and 1.c.)

*Subparas. 1.d. - 1.u.* Applicant admits that during the period 1990 - 1998 she did not file federal or state income tax returns, as required by law.<sup>(1)</sup> Although Applicant was not prosecuted for these offenses, she concedes that she engaged in the underlying misconduct by failing to file annual income tax returns during 1990 - 1998 as required.

*Subparas. 1.v. - 1.y.* Applicant denies that she failed to file federal and state income tax returns for the years 1999 and 2000, as alleged in subparagraphs. 1.v. through 1.y. She submits copies of her federal tax returns for these two years, and this evidence successfully rebuts the Government's allegations under subparagraphs. 1.v. and 1.x. pertaining to federal returns. However, Applicant does not submit state income tax returns for tax years 1999 and 2000. Therefore, her denials as to subparas. 1.w. and 1.y. pertaining to state returns are not supported by the evidence.

*Subparas. 1.z. - 1.aa.* Applicant's reply to the SOR is silent as to the Government's legal conclusions at subparas. 1.z. and 1.aa. which pertain to the administrative effects of her felony misconduct. These subparagraphs contain legal assertions based upon earlier factual allegations, and they are more fully discussed in the Conclusions section below.

**Paragraph 2 (Guideline E - Personal Conduct).** The Government alleges in this paragraph that Applicant is ineligible for clearance because she repeatedly furnished false material information to the Government during the clearance screening process. As before, Applicant responds by admitting to most of the Government's allegations while denying some of them.

*Applicant's admissions.* In her answer to Paragraph 2 Applicant admits she furnished false information as alleged in subparas 2.a; 2.c.; 2.d.; 2.e.(1.); 2.g.; and 2.h. of the SOR. In general Applicant admits that on numerous occasions she willfully and intentionally attempted to deceive the Government about the truth of her personal background.

These admitted falsifications took the form of untruthful information provided on employment applications, security clearance questionnaires and in sworn statements given to Government investigators. The Applicant lied on these occasions to prevent DoD and former employers from learning of her criminal record, overdue debts, judgments, garnishments and bad checks. Because the Applicant admits to the truth of the six allegations identified above, they are found against her.

*Applicant's denials.* Applicant denies that she engaged in the misconduct described in subparas. 2.b.; 2.e.(2)-(4); and 2.f. of the SOR.

*Subpara. 2.b.* Applicant denies that she furnished false information as alleged in subpara. 2.b. of the SOR. On August 15, 2000, Applicant completed a security questionnaire (Form SF 86) which asks in Question 20 whether Applicant was ever fired from a job during the last ten years. (Item 4.) Applicant answered "No" to the question. On September 12,

2001, Applicant furnished a sworn statement in which she stated she was fired from municipal employment in 1999, well within the ten-year period specified in the SF86. (FORM, Item 8.)

Applicant now explains that the 1999 date in her sworn statement was an error and should instead have been 1989. A review of Applicant's employment record confirms that she did not work for the city in the last ten years. Therefore, she was not required to answer question 20 in the affirmative. Subpara. 2.b. is found for the Applicant

*Subpara. 2.e.* Applicant also denies that she was dishonest when she answered "No" to question 34 of the SF 86 which asks whether her wages have been garnished in the last seven years. The Government alleges that Applicant's wages were garnished on four occasions, and Applicant was dishonest in her failure to admit these four garnishments. Applicant agrees with the Government's allegation as to one of the garnishments (subpara. 2.e.(1.)), but she denies any intentional dishonesty as to the remaining three (subparas. 2.e.(2)-(4)).

As to subpara. 2.e.(2), Applicant satisfactorily proves she was unaware of this garnishment when she answered the question. According to her employment record, she left this job five months before the garnishment order reached the employer. Therefore, it is likely she was unaware of the garnishment after she left the company, and her denial was not intentionally false. Subpara. 2.e.(1) is found for the Applicant.

Regarding the garnishments set forth at subparas. 2.e.(3) and (4), Applicant's denial of any knowledge of these garnishments is not supported by the evidence. The two garnishments occurred in September 1999 and November 1999 while Applicant was working for her present employer who received the garnishment orders. Furthermore, she signed the SF 86 on August 15, 2000, almost a year after the last garnishment occurred. Applicant's denial must be rejected.

*Subpara. 2.f.* Finally, Applicant denies the allegation that on September 10, 2000, she told a Government investigator her wages had never been garnished. However, the record contains a sworn statement (presumably in Applicant's handwriting) in which she states "I was asked on Monday Sept 10 I was asked [sic] if I had any garnishments and I said no because it was for taxes." (FORM, Item 8, p. 12.) Applicant's denial is not supported by the evidence.

Paragraph 3 (Guideline F - Financial). The Government alleges in this paragraph that Applicant is ineligible for clearance because she has engaged in illegal acts to generate funds and she has recurring indebtedness and financial problems.

The Government's allegations in this paragraph rely upon allegations and evidence set forth previously under Paragraphs 1 and 2. The Applicant admits to all of the allegations relied upon by the Government, and Paragraph 3 of the SOR is found against the Applicant.

Mitigation. As part of her response to the Government's SOR, Applicant provides information by way of mitigation in response to the Government's concern that she is untrustworthy and unreliable for purposes of access to classified information. In general, the Applicant asserts her recent work record and personal reform provide sufficient grounds to conclude she is now reliable and responsible.

Applicant states in various written submissions she has worked to overcome her felony conviction and she has learned a lesson from the experience. She offers assurances that she will not engage in any form of criminal conduct in the future. As to her finances, Applicant states she is a single parent, and for many years this contributed to her indebtedness. She is now enrolled in a credit counseling program and hopes to resolve her financial difficulties.

Applicant submits a letter from a program director in her present company, and the writer, a retired Army colonel, states Applicant is an exemplary employee. Another writer, Applicant's supervisor for three years, attests to Applicant's honesty and dependability, and the supervisor regards her as an excellent worker. Applicant has received outstanding performance appraisals for three years.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an

Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's request for access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline J - Criminal Conduct. *The concern:* A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses;
3. Conviction in a Federal or State court, including a court-martial, and sentenced to imprisonment for a term exceeding one year;

Mitigating Conditions applicable:

No mitigating conditions are applicable.

Guideline E - Personal Conduct. *The concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions applicable:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.
4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;
5. Association with persons involved in criminal activity.

Mitigating Conditions applicable:

5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

Guideline F - Financial. *The concern.* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions applicable:

1. A history of not meeting financial obligations;

2. Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

3. Inability or unwillingness to satisfy debts;

Mitigating Conditions applicable:

4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control.

The whole person concept. In addition to these guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Title 10 U.S.C., Section 986. Notwithstanding the above Policies, under the provisions of Title 10 U.S.C., Section 986, a Federal law, the Department of Defense may not grant or renew a security clearance to an Applicant who has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year, regardless of the amount of time actually served. However, the Secretary of Defense and the Secretary of the Military Department concerned may authorize a waiver of this prohibition in certain meritorious cases.

## CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in criminal activities, dishonest conduct, or financial irresponsibility. In a commonsense view, these unfavorable personal characteristics might easily lead to a compromise or loss of classified defense secrets.

With regard to burdens of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

In this case, the provisions of Title 10 U.S.C., Section 986 applies because in 1989 Applicant was convicted of the felony offense of Grand Larceny, and she was sentenced to two years' confinement. Although only a portion of this sentence was actually served, the Department of Defense may not legally grant a security clearance to Applicant unless the Secretary of Defense authorizes a waiver of this statutory prohibition.

As found above in the discussion pertaining to Paragraph 1 of the SOR (Guideline J - Criminal Conduct), Applicant's criminal activities include a lengthy and recurring scheme to steal valuable merchandise from her former employer. This scheme was carefully planned and executed, and it was carried out over several months. In 1996 and 1998, Applicant was charged with two additional violations of the state penal code. From 1990 to 2000 Applicant flouted tax laws by refusing to file annual income tax returns, thereby violating federal and state laws.

Moreover, Applicant was dishonest with the Government during the clearance screening process. Applicant admits to nearly all of the Government's allegations of intentional false statements. These admissions are sufficient to conclude that Applicant is willing to distort the truth, even in serious matters, where it suits her purposes.

As to Applicant's financial habits and practices, it is clear from the record that for many years Applicant has taken

lightly her responsibilities and duties as a debtor. To be sure, Applicant is a single mother who has experienced financial need. However, this circumstance is not a license to issue worthless checks and ignore court-ordered judgments.

Applicant is commended for her present efforts at reform and rehabilitation. Her supervisor and project manager attest that she is reliable and trustworthy on the job. Also, Applicant has made an initial effort to pay her overdue debts and bring other payments up to date. These efforts are praiseworthy and if continued over a longer period of time Applicant may well present evidence of permanent rehabilitation. However, at this point in time, Applicant's evidence of reform is insufficient to outweigh the adverse consequences of her past misconduct.

I do not recommend further consideration of this case for a waiver of Title 10 U.S.C., Section 986.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline J: AGAINST THE APPLICANT.

Subparas. 1.a.-1.u.: Against the Applicant.

Subparas. 1.v., 1.x.: For the Applicant.

Subparas. 1.w., 1.y.: Against the Applicant.

Subparas. 1.z.-1.aa.: Against the Applicant.

Paragraph 2. Guideline E: AGAINST THE APPLICANT.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: For the Applicant.

Subparas. 2.c.-2.e.(1): Against the Applicant.

Subparas. 2.e.(2): For the Applicant.

Subparas. 2.e.(3)-(4): Against the Applicant.

Subparas 2.f.-2.h.: Against the Applicant.

Paragraph 3. Guideline F: AGAINST THE APPLICANT.

Subpara. 3.a.: Against the Applicant.

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's request for a security clearance.

Burt Smith

Administrative Judge

1. Title 26 United States Code, Section 7203; and Section 58.1-348, Code of Virginia, Annotated.